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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 1.

JOSE ANTONIO FERNANDEZ Y PEREZ,
Plaintiff in Error,
vs.
JOSE PEREZ Y FERNANDEZ,
Defendant in Error.

In error to the District Court of the United States for the District of Porto Rico.

REPLY FOR PLAINTIFF IN ERROR.

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

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REPLY FOR PLAINTIFF IN ERROR.

I.

On the additional brief filed herein on behalf of the plaintiff in error pursuant to the order of the court of December 5, 1904, the writer, in discussing the third question propounded by the court, contended that no civil action like the one in this record was known to the laws and jurisprudence of Porto Rico at the time this action was instituted. It was also contended that, under the civil procedure existing in Porto Rico at the time of the attachment proceeding complained of in

this suit, the damages claimed herein could have been allowed and assessed *only in the attachment proceeding itself* when the attachment was dissolved. It is now admitted by counsel for the defendant in error that the Spanish laws then in force in Porto Rico (p. 27)

> made ample provision, in cases of wrongful attachment, for the assessment of damages, *in the attachment proceedings itself*, against the plaintiff wrong-doer in favor of the defendant who suffered loss or injury because thereof, and that in case of dispute as to the fact of damages or the amount thereof, specifically provided for the method of their ascertainment by articles 927 *et seq.* of the same code.

Moreover, it is to be inferred from the course of his argument that learned counsel admits also that the usual practice under the Spanish jurisprudence for recovering damages for a wrongful attachment is to make the application in the attachment proceeding itself. That this is the fact, is clearly shown by the cases cited on the additional brief for the plaintiff in error. (pp. 40-43.) But he seems to deny that this remedy was exclusive of any remedy by independent and separate action.

In the course of that discussion the writer, as pointed out by counsel (p. 34), reiterated the suggestion that if such a remedy existed under the Spanish law by an action independent of the attachment proceeding, counsel could best demonstrate the fact by citing decisions to that effect from the Spanish reports. From the time that has intervened between the filing of the additional brief for the plaintiff in error and that just filed on behalf of the defendant in error, it may well be assumed that counsel and his colleagues in this case have

spared no effort in the search for a precedent of that kind. The failure of counsel to produce such a citation and the writer's failure after an exhaustive examination to find such a case make it reasonably certain that no such ruling exists. Commenting upon this counsel seems to think (p. 38) that the mere absence of a decision on the point signifies nothing. In this view the writer is not able to concur. Certainly in connection with the very explicit provisions of law for assessing damages in the attachment proceeding itself, referred to in detail on the additional brief for the plaintiff in error (pp. 35-50), and in view of the commentary there cited (p. 46) of an eminent Spanish law writer in support of the very proposition here involved, and in view of the very logical and clear reasons why the judge who orders the attachment and subsequently orders it to be vacated (p. 49) should be the judge to pass on and control the question of damages arising out of his own judicial act, the absence of a single case upholding the right to recover by an independent action would at least seem to demonstrate and justify the belief of the entire bar and judiciary not only of Spain, but of the Philippines, Cuba and Porto Rico, that no such remedy exists. It is inconceivable that from all these widely separated Spanish speaking countries, whose commercial and domestic affairs were regulated by the same general system of laws, there should be not even a single instance in which an independent action had been instituted to enforce redress for damages suffered by a wrongful attachment. Certainly under such circumstances this American court would hesitate to be the first court to declare that such

an independent remedy did in fact exist under the Spanish jurisprudence.

Counsel states (p. 33) that "if it was necessary so to do, very respectable authority could be found" for the proposition that there is an independent action for damages for a wrongful attachment. As an example of such authority he has cited (p. 33-34) the *Decision of December* 16, 1903. So far from aiding his argument, it is insisted that the case on its very face and as stated by counsel himself, is an admirable ruling in favor of the contention of the plaintiff in error that there is no independent remedy by which damages may be recovered for a wrongful attachment. The facts in the case, as stated by counsel, are sufficient to show this. But it may be well to make a more complete statement of them.

The case then is this: José Llach had inherited a pharmacy from his father in Barcelona. In order to carry it on to better advantage, as he thought, he rented a store in a more central position in the city. Matters did not prosper well with him and from time to time he appealed to his mother-in-law, Madam Clot, for aid. Her advancements to him finally aggregated the sum of 19,000 *pesetas*. The greater portion of this debt was due and payable when, on June 30, 1890, by formal deed and in payment of his debt he assigned the entire property to his mother-in-law as her absolute property, with full right to dispose of it as she might deem wise. She then leased the whole enterprise back to him for a term of five years with the right to renew the lease, but upon the express condition that in case he failed to pay the rent for the premises occupied by him the lease

should *ipso facto* terminate, she to have the right of reentry. During the following year Mr. Llach failed to pay the rent and the owners of the store occupied by his pharmacy brought suit against him by attaching the medicines, furniture and other movable property in the pharmacy. They proceeded under the impression that the property seized belonged to Mr. Llach. Madam Clot, being the real owner, thereupon brought an action, known in the Spanish law as *terceria de dominio*, to recover the possession of the property seized on the attachment proceeding against her son-in-law. Her action was very much in the nature of our action of replevin. The owners of the premises, learning of her claim of title, abandoned the attachment. It is true that Madam Clot claimed damages against them for dispossessing her of her property; but it is to be noted that her claim for damages was made in and as a mere incident to the replevin proceeding. Damages were denied because she herself had arranged in the lease to her son-in-law that the property might remain in his possession, and the attachment had been abandoned before it was taken out of his possession. The court therefore held that she had not been damaged. The special point suggested by the case is that the Spanish law governing some of the actions in the general nature of replevin seems to provide, as in the case of attachments, for the adjustment *in the proceeding itself* of the losses and damages arising out of the disturbance of the possession of the owner. For an example of this see Art. 1656 of the Law of Civil Procedure.

From no point of view can the action of Madam Clot to recover damages for the disturbance by

the owners of the store of the possession of her property be said to be an independent action for damages for the wrongful attachment of her property. Her action in replevin was in no sense an action in tort. It was an action to try the *title to* or *right to possession* of the property involved. It was an action *to recover the property* and not an action to recover damages. As an incident to the effort to regain possession of what belonged to her, in which effort she succeeded, the law afforded her a claim for damages as a part of the self-same proceeding.

By citing that case counsel simply lends emphasis to the contention of the plaintiff in error that the place and the only place under the law for adjusting the claim of the defendant in error for damages arising out of the attachment here complained of was in the attachment proceeding itself. A careful examination of the provisions of the Spanish Code referred to in detail on the additional brief for plaintiff in error (pp. 35-49), together with the failure of counsel on both sides to find any precedent for an independent action for damages for wrongful attachment seems to demonstrate that there is no independent remedy and that the lower court in granting such a remedy in this case was exercising a jurisdiction that did not exist.

The *Decision of November* 26, 1857, which counsel cites (p. 37) does not seem to appear in the official reports. The *Decision of July* 6, 1885, does not relate to the attachment laws and is cited by counsel as having a bearing only "by way of analogy." As the laws relating to attachments contain special provisions requiring the damages to be adjudged in the

proceeding itself, the case cited seems to have no value in this discussion. He also cites the *Decision of April 7*, 1868, and quotes from it, (p. 37). This case arose under the old law of attachments and decides nothing except that when an attachment is vacated the plaintiff ought to pay the costs. Apparently the defendant did not claim to have been otherwise damaged.

The *Decision of June* 21, 1893, erroneously referred to by counsel, (p. 38), as of July 21, 1903, has no relation to this question. It is the case referred to by the writer on p. 45 (*q. v.*) of his additional brief in connection with a quotation (p. 46) from the edition of 1891 of the Commentaries on the Law of Civil Procedure by Sr. José Maria Manresa y Navarro. It has relation to the mortgage law of Spain and not to the attachment law; and it was held that there was no authority in the mortgage law in a proceeding to remove clouds, to adjudge damages against one who had put the cloud of record. It was in connection with that decision that Sr. Manresa, at the point cited, distinguished the rule applicable to such cases from the rule applicable to attachments. He there expressly states that the very purpose of the new attachment law in force at this time was to avoid a new suit to recover damages for a wrongful attachment and to provide for their recovery in the attachment action itself.

(See additional brief of plaintiff in error, p. 46.)

The quotation by counsel from an old edition of the Commentaries on the Law of Civil Procedure by Sr. Manresa is not without interest. It is useful in this

discussion because it lends support to the doctrine here contended for by the plaintiff in error. The author, it will be carefully noted and, as counsel points out, is dealing in that edition of his work not with the law of attachments in force at the time involved on this record, but with the old law of attachments. And Sr. Manresa has observed with care the omission, from Art. 939 of the old law, of a provision imposing upon the plaintiff the losses and damages as well as the costs when an attachment is vacated for reasons assigned in that article. He has also noted that the provision as to losses and damages is expressly included in Art. 940 of the old code. At the point quoted by counsel, the author, commenting on those two articles, draws the distinction between them with respect to the losses and damages which is required by this difference in language. When an attachment is vacated under Art. 940, the author shows that the costs, together with the losses and damages, are to be adjudged against the plaintiff in the attachment proceeding itself. But because of the omission to include losses and damages in Art. 939, he points out that, when the attachment is vacated for reasons specified in that article, only the costs can be imposed in the attachment proceeding; the losses and damages, as he thinks, being recovered in another suit. That edition of the author's commentaries is not available here, but such seems to be the meaning of the quotation made from it by counsel as it is translated on his brief (p. 35, 36). There are some obvious defects in the translation, and the original text would be of interest. For it will be observed that the purpose of the new suit, which the author seems to speak of, is "in order to fix their amount (*i. e.*, of

damages) according to paragraph 2 of article 63." The latter article, as counsel explains in the quotation, is equivalent to articles 927 *et seq.* of the new code, which refer only to an *incidental* proceeding in connection with some other main proceeding.

But in the present law of attachments there is no such omission. In Articles 1410, 1411, 1413, 1414, 1415, 1416, wherever costs are directed to be allowed against the plaintiff upon the vacation of an attachment, the new law is careful to provide that losses and damages shall also be adjudged against him in the same ruling. And the same author, as pointed out in the quotation from him made at p. 46 on the additional brief for the plaintiff in error, shows and expressly states that the very purpose of the new law was to avoid a new suit, the losses and damages being adjudged against the plaintiff in the same proceeding. The quotation by counsel from the old edition of this treatise seems to add interest to the distinction between the old law and the new, and to make it absolutely certain that under the present law an independent action does not exist.

Although counsel states (p. 38) that "much more might well be found by further search," he nevertheless has found nothing more. He has produced neither a decision by a court nor a statement by any law writer upholding his contention that this independent action in tort to recover damages for the alleged wrongful attachment was competent under the laws then in force in Porto Rico. On the contrary he is compelled to and does distinctly admit, (p. 37), that, under the first paragraph of article

1411, when an attachment is dissolved for one cause "*it is the duty of the judge to assess immediately the damages in that case.*" But he asserts that when an attachment is dissolved under the second paragraph of the same article "for any other cause" the language of that paragraph is directory only and the judge may or may not award damages in the proceeding itself as he may see fit.

This suggestion of an essential difference of meaning between the two paragraphs of article 1411 seems to be merely a strained effort on the part of counsel. There is nothing in the language of the two paragraphs to justify it. If Articles 1410, 1411, 1413, 1414, 1416 be read together it will be impossible to escape the conclusion that their clear intent and purpose is that the court *in the same ruling* by which the attachment is vacated *shall also determine* the liability of the plaintiff in attachment for the losses and damages suffered by the defendant. This seems to be especially clear from the language of the second paragraph of Art. 1411, which is the occasion of the distinction endeavored to be drawn by counsel. The provision there is that when an attachment is vacated "the *ruling* thereupon shall also *determine*" the liability of the plaintiff in attachment for the losses and damages suffered by the defendant. No language could be used which would more plainly or clearly impose upon the judge the duty of deciding the liability of the plaintiff for the damages. The utmost that can be said of the phrase "what may be proper according to the cases" as used in that clause is, that, when an attachment is vacated "for any other reason" not specified affirmatively in any of the articles in that chapter, the court may take an equitable

view, according to all the circumstances of the case, of the extent or amount of the plaintiff's liability. But in any event the language of that paragraph clearly requires the court to determine whether or not such liability in fact exists.

II.

The first twenty-seven pages of counsel's additional brief just filed herein are given over to the effort to respond to the proposition of the plaintiff in error that the Spanish jurisprudence is lacking in any department corresponding exactly to our law of torts and is lacking in a form of action exactly like our action in tort. Learned counsel has examined with some elaboration and care the civil code of France as well as the French decisions bearing upon the question. He has also examined the civil codes of other countries as well as that of Spain. And he has reached the conclusion that the law of torts is fully and completely developed in Spanish jurisprudence.

This question has perhaps something more than a merely academic interest in connection with this record. But in its most concrete and practical form the real question here involved is whether the laws then in force in Porto Rico contained provisions for awarding damages for a wrongful attachment in the attachment proceeding itself, and if so whether that remedy was exclusive of all other remedies. In the discussion of this question learned counsel has wholly failed to produce any authority to uphold his contention that there is an independent remedy, or to cast doubt upon the plain intent and meaning of those articles of the law of civil

procedure referred to on the brief for the plaintiff in error (pp. 46-50), which provide and require the damages to be assessed in the same proceeding.

For this reason the writer deems it unnecessary to follow further the discussion as to the Spanish law of torts and its application herein. He is content to rest upon what has heretofore been said on that question in his additional brief (pp. 26-32) and in the preceding pages.

The next seven pages of counsel's brief are devoted to the proposition that the attachment laws of Porto Rico then in force have no relation to this controversy, first, because the plaintiff in error was not a party plaiatiff to the original attachment proceeding; and, second, because the Federal court in which those proceedings were had was without authority, as counsel contends, to proceed in conformity with the code of civil procedure then in force in the island.

Of these two suggestions the latter is the more extraordinary. And it is difficult to follow counsel's course of reasoning in that connection and to ascertain clearly the exact thought in his mind. He points out (p. 29) that the original Federal court in Porto Rico had jurisdiction of all cases that would be cognizable by a circuit court of the United States, and (p. 30) that it was required to proceed in such cases as nearly as practicable as a circuit court of the United States would proceed. He then asserts that there is no procedure known in the Federal courts by which they are authorized to determine and assess damages for a wrongful attachment. Referring then to Sec. 914 of the Revised Statutes of the United States, he declares that

it neither helps the contention of the plaintiff in error nor throws any light upon the real point involved in this case. He deduces from his consideration of the whole question the proposition that even if it be true that the local laws required the trial court to assess the damages in the attachment action, this cannot be required of a Federal court because it would be contrary to the constitutional requirement and "laws governing the trial of issues of fact by a jury."

The writer must decline to enter upon any discussion of the constitution as applied to this case. For there is no place for such a discussion. No one can reasonably contend that any clauses of the constitution or any law of Congress now in force, could or would prohibit a Federal court in Illinois, for instance, from assessing damages against a plaintiff in attachment without the intervention of a jury if the state law so provided. If the attachment laws of Illinois permitted the court upon the vacation of an attachment to assess in the attachment action itself not only the costs against the plaintiff, but also the defendant's damages, and the plaintiff, with knowledge of that requirement of law, should resort to such a remedy against his debtor, it seems clear that he could not subsequently object to the assessment of the damages against him on the ground that he had a right to have them assessed by a jury.

The true view undoubtedly is that a Federal court sitting in a state, and consequently that the Federal court sitting in Porto Rico, cannot entertain jurisdiction or proceed in an attachment suit except in exact accordance with the provisions of the local law. And if for any reason, constitutional or otherwise, the

Federal court is not able to follow out and give effect to all the provisions of the local law, it cannot entertain jurisdiction in attachment at all.

In Waples on Attachment it is said (p. 325):

> Federal courts are bound to observe the statutes of the state courts. When trying an attachment cause in any state, a United States circuit court must give effect to the attachment laws there in force, and to their construction by the Supreme court of that state.

In *Bates et al.* v. *Days*, 17 Fed., 167, Judge McCrary said upon motion for rehearing (p. 170):

> The United States has no attachment law of its own, but its courts are required to administer the remedies by attachment which are provided by the law of the state in which such courts are held. Rev. Stat., Sec. 915.
>
> We must administer the attachment laws of the state as we find them and so as to afford to suitors in the federal courts the same remedies afforded to suitors in the state courts; neither more or less. * * * It may be true, as contended by counsel for plaintiffs, that there are difficulties in the way of the enforcement of this statute in the federal courts; but they are not insurmountable. If they were, the result would probably be to deprive this court of jurisdiction in attachment cases. *If this court cannot administer the remedies by attachment according to the statute of the state*, and afford to suitors all the remedies provided by those statutes, *it may be doubtful, to say the least, whether it ought to entertain a suit by attachment at all.* * * * It seems to me that this court should administer the whole statute, and not a part only.

In the same case Krekel, J., at p. 169, said:

> Federal and state courts are not foreign courts or in hostility to each other in administering jus-

> tice between litigants. The citizen of the state in the federal court is as much in his own court as in the courts of the state. The rights he has he cannot be deprived of in a federal court.

The second suggestion in that part of counsel's brief (p. 28), namely,—that the plaintiff in error was not a party plaintiff in the attachment proceeding and (p. 39) that if he could not be reached by the defendant in error by the independent action in tort, the defendant in error would be without any remedy against him,—is equally without merit.

In the first place Aguerria, the plaintiff in the original attachment proceeding, was the principal defendant in this proceeding. It was therefore an action to recover damages against the plaintiff in the attachment proceeding. As to such damages the law provides, as heretofore shown, that they may be recovered only in the attachment proceeding itself. The defendant in error therefore sought in this independent action to recover what, under the law, could not be so recovered. The mere fact that service was not made on Aguerria, who was also a resident of the island (Rec., 1), does not relieve the action from its essential character as being an independent action to recover damages against the plaintiff in attachment. If the agent Fernandez under the law can also be said to have been liable by reason of his participation in the attachment suit, there is no reason why, in the incidental proceeding required by law, he could not have been made a party, and his liability thus asserted and tested along with the alleged liability of Aguerria.

This suggestion by counsel affords further occasion for pointing out the great disorder and confusion that exists in Porto Rico because of the tendency of the Federal judicial authorities in that island to ignore the local laws. The law of attachments then in force in Porto Rico differs very radically from the law of attachments commonly in force in the United States. Here the issuing of the attachment writ is the ministerial act of the clerk of the court. Customarily he has authority to issue such a writ upon the filing of a bond together with an affidavit showing the existence of circumstances authorizing an attachment to be made. Under the Porto Rican laws the issuing of a writ of attachment is a judicial act and can only be ordered by the court upon a hearing. (Art. 1401.) Instead of such an affidavit as is generally required in the United States, the plaintiff under the Porto Rican law must make his showing in court before the judge. *No affidavit is required.* (See Title XIV, Section 1.) He must appear and support his petition for an attachment. That was the law of the island. But the Federal judicial authorities did not follow it in this case. The plaintiff in error was required to make an affidavit and attach it to the declaration. The clerk of the court thereupon issued the writ. It was a ministerial act and not a judicial act by the presiding judge of the court.

All this suggests that it is high time that by some announcement from this court the Federal court in Porto Rico be put on its true course with relation to the local system of laws.

III.

On the original brief filed on behalf of the defendant in error at the October Term, 1903, it was conceded by counsel (pp. 9-10), that this court may now consider and determine the contention of the plaintiff in error that the lower court was without jurisdiction to entertain this form of action and to decide the issues between the parties in accordance with the principles of the common law and in disregard of the local laws, pleading and practice then in force in Porto Rico. On the additional brief just filed herein on behalf of the defendant in error pursuant to the order of this court, it is again conceded (p. 7), that the court may now proceed to ascertain from the record whether the trial court in entering this judgment has exercised a jurisdiction that did not belong to it, as contended by the plaintiff in error. Both parties therefore have joined in answering in the affirmative the first question propounded by this court in its order of December 5, 1904.

There is however another ground upon which the court may take jurisdiction and revise the judgment entered in the court below. And although both parties have agreed that this court has jurisdiction on the grounds already suggested, the writer nevertheless ventures to make an additional suggestion touching that point.

It is this: It is well settled by repeated decisions in this court that when a case comes before it upon a writ of error the whole record is subject to the revisory power of the court and any error apparent upon

the face of the record may and indeed must be considered.

This general rule is well stated in *Suydam* v. *Williamson*, 20 How., 427, at p. 433 as follows:

> It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the Appellate Court, *any error apparent in any part of the record is within the revisory power of such tribunal.* The rule is, that *whenever the error is apparent on the record*, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner.

In *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 592, the language of the court is as follows (p. 600):

> Writs of error, it is true, bring up the whole record, and it is undeniably competent for the court to reverse the judgment *for apparent error*, whether it appear in the bill of exceptions *or in any other part of the record.*

In *Insurance Co.* v. *Piaggio*, 16 Wall., 378, it is said (p. 386):

> Errors apparent in other parts of the record may be re-examined, as well as those which are shown in the bill or bills of exceptions, and it is too plain for argument that the verdict and judgment are a part of the record. Whenever the error is apparent in the record, the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error *in the foundation, proceedings, judgment, or execution of a suit in a court of record.*

This rule has a very clear application to this case. Upon the original brief for the plaintiff in error (pp. 21, 22, 24), and on the additional brief (p. 11), it was shown that the statute creating and establishing the United States District Court for the District of Porto Rico, put that court in the exact status of a Federal court sitting in one of the states of the United States. Moreover this statute, after giving to the Federal court in Porto Rico the ordinary jurisdiction of a district court of the United States, also gives it the jurisdiction of a circuit court of the United States. And it provides that "it shall proceed therein *in the same manner* as a circuit court." In other words, the United States District Court for the District of Porto Rico, so far as the local laws are concerned, occupies exactly the position of a circuit court of the United States sitting in a state. It is therefore just as much bound as is a circuit court of the United States to the observance, with respect to the local laws of the island, of Section 721 of the Revised Statutes, which provides that in the Federal courts the laws of the several states shall be regarded as the rules of decision in trials at common law; and to the observance of Section 914, which requires Federal courts to conform "as near as may be" to the practice, pleadings, forms, etc., of the courts of record of the state in which they sit.

What was the purpose of Section 914 of the Revised Statutes of the United States, which requires the Federal courts in civil causes to conform "as near as may be" to the practice, pleadings, forms and modes of proceeding in the courts of record of the state within which

they sit? The question is clearly answered in *Nudd* v. *Burrows*, 91 U. S., 426. At p. 441 this court explains that provision of law in the following language:

> The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. *This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both.* The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes.

This view of the statute in question was approved in *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S., 291. After repeating the substance of the language above quoted from *Nudd* v. *Burrows*, the court gives application to the rule by saying (p. 300):

> Where a state law, in force when the act was passed, has abolished the different forms of action and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law *is undoubtedly obligatory upon the courts of the United States in that locality.*

If the abolition in Indiana of the common law forms of action and the substitution for them of one general form of action be binding upon a Federal court sitting

in that state, why should not a similar condition in Porto Rico be obligatory upon the Federal court sitting in that island? By the statute creating that court all the laws that apply to Federal courts in Indiana also apply to the Federal court of Porto Rico. Has the Federal court of Porto Rico the right to substitute common law forms of action in causes before it for the forms of action provided in the local law?

In *Lewis* v. *Gould*, 13 Blatchf., 216; 15 Fed. Cas., p. 483, the defendants moved to set aside a replication on the ground that it was a pleading not authorized by the local law. The motion was granted and the court, construing and applying section 914 of the Revised Statutes, says:

> No language can be more direct or plainer than this to convey the will of the congress, that the pleadings in the circuit and district courts shall be conformed to those employed in the state practice, "as near as may be." The qualification contained in this last phrase is not to be construed to subvert the command of the statute. "As near as may be" *allows only necessary variations* from the state methods, growing out of the different organization of the courts, and other similar matters.

It is also held in that case that common law forms of pleading are not only no longer necessary in the United States courts sitting in the State of New York, but they are *not admissible* except as they may be admitted to be a substantial compliance with the requirements of the local code of procedure.

If common law pleadings be not admissible in the Federal courts sitting in the State of New York because, under section 914, those courts are required to follow the pleadings and practice required by the state

code, what can justify the Federal court of Porto Rico in wholly ignoring and setting aside the local pleadings and practice and substituting for them the whole common law system of pleading and practice? Instead of following the local system "as near as may be," the Federal court of Porto Rico has ignored the duty to the people of that island and to the members of its Bar imposed upon it by that section of the revised statutes. Instead of conforming "as near as may be" to the local system with such "necessary variations" as may grow out of its different organization, it has simply adopted *en masse* the common law system of pleading and practice, which is altogether unknown to the local Bar.

In *Sears* v. *Eastburn*, 10 How., 187, it appears that the legislature of Alabama had abolished the fictitious proceedings in ejectment and substituted the action of trespass as the remedy for trying title to and recovering the possession of real estate. Such an action in trespass having been brought in the Circuit Court of the United States in Alabama, it was dismissed on the ground that the act of the local legislature abolishing the action in ejectment did not control in the Federal court. This court held that the dismissal was plainly erroneous, as the act of Congress of May, 1828,

> makes it *obligatory* upon the courts of the United States to conform in their mode of proceeding to the law of the state. The law of the state of itself, undoubtedly, was not obligatory upon the courts of the United States, *but it is made so by the act of Congress.*

If this act of the legislature of Alabama, abolishing one form of action and substituting another as the method for trying the title to real property in that state, be so far binding upon the Federal courts in

Alabama as to require the reversal of a judgment because the Federal court ignored the local law and insisted on an action in ejectment, how can this court permit the judgment herein to stand when it appears on the very face of the record that the lower court not only substituted a common law action for the action provided in the laws of the island, but tried and disposed of the case on common law pleadings and upon common law principles?

See also *B. & O. R. R. Co.* v. *Hamilton*, 16 Fed., 181.

Now it has been shown, and a merely casual examination of this record will demonstrate it beyond question or doubt, that from the beginning to the end of this proceeding the practice, pleadings and forms were those of the common law; and that the court proceeded without a thought as to the local practice, pleadings and forms and in utter and complete disregard of the whole local system of laws. Other records in this court from the same quarter show that the United States District Court for the District of Porto Rico deliberately follows the common law of England as the general basis of pleading, practice, forms and procedure in all causes, not equitable in their nature, that come before it; and that with equal deliberation it resolves questions of law involved in such causes in accordance with the principles of the common law. In this case, for example, the lower court tells the jury, composed of Porto Ricans (Rec., 72), that:

> This is an action styled in the law books an "*action upon the case.*" Stated in a different

> way, it is an action for a *malicious prosecution*, for the malicious suing out of an attachment—that is, that it was done without proper cause and with malice.

The "law books" here in the mind of the court were text-books relating to the common law. The "action upon the case" is a common law action and is unknown to the law of Porto Rico. And the talk that follows (Rec., 73) about malice and the right to presume malice is recognizable by all as plain, every day common law talk. The court made no pretense that it was based upon the local law. On the contrary the court told the jury (Rec., 75) that in the absence of probable cause for suing out the attachment they might presume that the attachment plaintiff acted with malice; and that if he had probable cause his act was not malicious and he could not be held in damages. This may be the test at common law. But the test under the local law of the right to recover damages was the mere vacation of the attachment and nothing else.

See Articles 1410, 1411, 1413 and 1415 of the *Law of Civil Procedure*. See, also, *Jerman* v. *Stewart*, 12 Fed., 266, where there is a ruling to the same effect under the code of Tennessee.

If the attachment was vacated by the court for any reason, the good faith of the attachment plaintiff in asking for it had no relation whatever to the duty of the court to award damages against him. The only thing left for the court to determine was whether any damages had in fact been suffered and if so, what was their amount.

This difference between the principles of the com-

mon law and the provisions of the local law was a very wide one. But the court did not stop there. He even said to the jury that "the plaintiff in this suit could not sue until the other suit was determined." (Rec., 75.) In the face of the provisions of the local law for assessing the damages in the attachment suit itself this part of the instructions of the court shows how fully he was following the general jurisdiction in relation to attachments as it exists in the common law states of the United States, and how far away he was from the local law. And throughout the record the court gave no indication of any kind, however slight, that it was concerned in any way as to what the law of the island might be in such a case.

This course it is contended is not only without warrant of law but works a hardship upon the local bar and is a real menace to the people of Porto Rico. Moreover it is just as great an affront to the people of Porto Rico and just as great an invasion of their rights as it would be to the people of the State of New York if a Federal judge of common law education should ignore the local codes of that state and enforce common law principles and common law pleadings and practice in his court. And it is earnestly submitted that the application in this case of the common law both with respect to the pleading and practice and procedure and forms and to the questions of law involved—*in* other words, the adjudication of the contention between the parties as if it were a common law action to be resolved in accordance with with common law principles—was error apparent on the face of the record of which this court, now that the point is raised, ought to and must take cognizance.

Even the tribal laws and customs of our American Indians have been accorded the dignity of being respected by the Federal courts, a dignity that has been denied by the lower court in this case to the laws of Porto Rico. In *Mackey* v. *Coxe*, 18 How., 100, this court held that the Cherokee Indians were governed by their own laws, and (p. 103) that there was

> no reason why the laws and proceedings of the Cherokee Territory, so far as relates to rights claimed under them, should not be placed upon the same footing as (the laws of) other Territories in the United States.

In *Davison* v. *Gibson*, 56 Fed., 443, there was a controversy as to the right of a husband to the personal property of his deceased wife, both of them being citizens of the Creek Nation. The opinion of Caldwell, Circuit Judge, sitting in the Circuit Court of Appeals, indicates that the trial court applied the common law to the solution of the controversy, and not the local laws of the Creek Nation. This was held to be error, and the judgment below was reversed and a new trial ordered, the court insisting that the controversy could only be decided in accordance with the local laws and customs of the Creek Nation, and that it was entirely anomalous to apply the common law of England, which had never been in force to regulate the domestic relations of the Indians of this country.

The action now before this court was entertained by the court below as a purely common law action. The process of the court and all its orders including its final judgment are in the form required at common law. The pleadings are those of the common law. The rulings on evidence and the instructions are all based

on common law principles. It was a common law proceeding in all respects as fully as if it had been tried in a common law state like Illinois. And it is insisted that it was error in the court below to entertain the action as a common law action or to proceed to dispose of it in accordance with common law practice and upon common law principles. Although no exception was preserved on this point, the error nevertheless appears upon the face of the record, and should now be considered by this court.

The case presents on the face of the record an error that strikes at the very foundation, not only of the judgment but of the whole proceeding. The proposition is that the court had no such jurisdiction as it exercised, that it could grant no such remedy and that the whole proceeding was erroneous from its inception to its conclusion.

In *Harvey v. Commonwealth of Virginia*, 20 Fed., 411 (p. 416), it is said:

> In regard to suits in equity, the states have no power, direct or indirect, over the procedure in federal courts; and it is questioned whether congress can confer it to any material extent. But the states have been clothed by congress with a large, though indirect control over the practice of the federal courts in common-law cases. Section 914 of the Revised Statutes of the United States provides, etc., etc. * * * This court is therefore authorized *to look into the laws of Virginia* relating to the practice prescribed to its courts in cases at law, and *to determine from those laws whether it has jurisdiction to entertain a proceeding like the one now under consideration.*

And this court, it is insisted, may now look into the laws of Porto Rico and determine whether the lower

court had jurisdiction to entertain a proceeding like the one on this record.

The judgment entered in the court below should be reversed.

Respectfully submitted,

JAMES S. HARLAN,
JOHN MAYNARD HARLAN,
Attorneys for Plaintiff in Error.